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No. 98-1279

In the Supreme Court of the United States

OCTOBER TERM, 1998

LUCKY STORES, INC. AND SUBSIDIARIES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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22 pp

QUESTION PRESENTED

Whether contributions to multiemployer defined benefit pension plans made by petitioners after the close of their 1986 tax year were deductible in that year under Section 404(a)(6) of the Internal Revenue Code, 26 U.S.C. 404(a)(6).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Airborne Freight Corp. v. *United States*, 153 F.3d 967 (9th Cir. 1998), petition for cert. pending, No. 98-1287	10
American Stores Co. v. *Commissioner*, 108 T.C. 178 (1997), aff'd, No. 97-9025, 1999 WL 122996 (10th Cir. Mar. 9, 1999)	8, 10, 11, 12, 13, 16, 17
Beneficial Found., Inc. v. *United States*, 8 Cl. Ct. 639 (1985)	14, 16
Bookwalter v. *Brecklin*, 357 F.2d 78 (8th Cir. 1966)	14
Bornstein v. *United States*, 345 F.2d 558 (Ct. Cl. 1965)	14
Carpenter v. *United States*, 7 Cl. Ct. 732 (1985), aff'd, 790 F.2d 91 (Fed. Cir 1986)	14
Deal v. *United States*, 508 U.S. 129 (1993)	10
Dickman v. *Commissioner*, 465 U.S. 330 (1984)	14-15
Dillon, Read & Co. v. *United States*, 875 F.2d 293 (Fed. Cir. 1989)	16
Dixon v. *United States*, 381 U.S. 68 (1965)	15
Estate of McLendon v. *Commissioner*, 135 F.3d 1017 (5th Cir. 1998)	15, 16
Estate of Shapiro v. *Commissioner*, 111 F.3d 1010 (2d Cir. 1997), cert. denied, 118 S. Ct. 686 (1998)	14
Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959)	14

Cases—Continued: Page

International Bus. Machs. Corp. v. *United States*, 343 F.2d 914 (Ct. Cl. 1965), cert. denied, 382 U.S. 1028 (1966) 14

Minchin v. *Commissioner*, 335 F.2d 30 (2d Cir. 1964) 14

Norman Corp. v. *District Director of Internal Revenue*, 446 F.2d 1374 (9th Cir. 1971) 13-14

Shakespeare Co. v. *United States*, 389 F.2d 772 (Ct. Cl. 1968) 14

Silco, Inc. v. *United States*, 779 F.2d 282 (5th Cir. 1986) 16

Stichting Pensioenfonds Voor de Gezondheid v. *United States*, 129 F.3d 195 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 43 (1998) 14

Teichgraeber v. *Commissioner*, 64 T.C. 453 (1975) 14

Travelers Ins. Co. v. United States, 35 Fed. Cl. 138 (1996) 16

Van Norman Indus., Inc. v. United States, 361 F.2d 992 (Ct. Cl. 1966), cert. denied, 386 U.S. 981 (1967) 14

Western Co. of N. Am. v. *United States*, 699 F.2d 264 (5th Cir. 1983), cert. denied, 464 U.S. 892 (1983) 14

Internal Revenue Code (26 U.S.C.):

§ 404(a) 7, 17

§ 404(a)(1) 3

§ 404(a)(6) 3, 4, 6, 7, 9, 17

§ 413(b)(7) 3, 5, 7, 10, 17

§ 414(f)(1)(A) 2

§ 414(f)(1)(B) 2

§ 6110(j)(3) 5, 13

Treas. Reg.:

§ 601.601(d)(1) 13

§ 601.601(d)(2)(v)(d) 15

Miscellaneous:

	Page
H.R. Rep. No. 658, 94th Cong., 1st Sess. (1975)	13
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974)	17
H.R. Rep. No. 869, 96th Cong., 2d Sess., Pt. 1 (1980)	17
Rev. Proc. 89-14, 1989-1 C.B. 814	13
Rev. Proc. 90-2, 1990-1 C.B. 386	15
Rev. Rul. 76-28, 1976-1 C.B. 106	4, 5, 7, 11, 12, 15, 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 153 F.3d 964. The opinion of the Tax Court (Pet. App. 10-33) is reported at 107 T.C. 1. The supplemental opinion of the Tax Court (Pet. App. 34-42) is unofficially reported at 73 T.C.M. (CCH) 1956.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1998. The petition for rehearing was denied on November 12, 1998 (Pet. App. 50-51). The petition for a writ of certiorari was filed on February 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to collective bargaining agreements with various labor unions, petitioners were required to make monthly contributions to 29 multiemployer, defined-benefit pension plans on behalf of certain of their unionized employees (Pet. App. 2, 4, 12).[1] The amount of the monthly contributions required under the collective bargaining agreements was based on a prescribed rate per hour (or unit-of-service) of work performed, multiplied by the number of hours (or units-of-service) of work performed by each covered employee during that month (*id.* at 6, 13, 21). Pursuant to the collective bargaining agreements, employers were required to make the contributions for covered services in the month immediately following the month in which the services were performed (*id.* at 6, 12-13). Plan administrators therefore sent the participating employers a payment form at the end of each month (*id.* at 29). The employers completed the form by listing the names of and hours worked by each employee and by remitting the amount of the total required contribution (*id.* at 6, 13, 29).

Plan administrators monitored the dates of receipt of the monthly contributions and could assess interest charges and late fees on delinquent accounts (Pet. App. 6, 16). There was no mechanism for the plan administrators to receive or credit contributions in excess of the required amounts, and petitioners made no advance contributions (*id.* at 6, 17). Plan administrators treated each remittance as the fulfillment of the employer's

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[1] A "multiemployer" pension plan is a pension plan "to which more than one employer is required to contribute" that is "maintained pursuant to one or more collective bargaining agreements." 26 U.S.C. 414(f)(1)(A), (B).

required contribution for the discrete month for which the covered services were provided (*id.* at 6, 29-30). Actuarial reports prepared by plan administrators reflected only payments for hours worked by covered employees during each plan year (*id.* at 16-17).

b. Under Section 404(a)(1) of the Internal Revenue Code, a contribution to a qualified pension plan is ordinarily deductible only in the taxable year in which the contribution is actually paid to the plan trust. As a limited exception to this general rule, Section 404(a)(6) permits a deduction for contributions made *after* the close of the taxable year, but *before* the date that the taxpayer's tax return for the year is due (including extensions), *if* the contributions are made "on account of" the previous taxable year. 26 U.S.C. 404(a)(6).

Section 404(a)(1) also provides rules governing the maximum amount of deductible contributions to qualified plans. In the case of a collectively bargained pension plan, the deduction limit of Section 404(a)(1) is determined "as if all participants in the plan were employed by a single employer." 26 U.S.C. 413(b)(7). For such plans, contributions by employers are not considered to exceed the deduction limitation if "anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation." *Ibid.*

Prior to the end of petitioners' 1986 tax year on February 2, 1986, petitioners' computed their deduction for contributions to the multiemployer plans by adding the 12 contractually required monthly contributions made in respect of hours of covered services worked during the year (Pet. App. 3, 14). Petitioners obtained an extension until October 15, 1986, to file their return for their 1986 tax year. On their return, petitioners

sought to deduct not only the 12 contributions made in respect of services performed during that year but, purporting to rely on Section 404(a)(6), also deducted the amounts of seven or, in the case of some plans, eight additional monthly contributions in respect of services performed during the following year—the period from February through October 1986. Although these additional contributions were for services performed after February 2, 1986, petitioners asserted that they were made "on account of" the year ending February 2, 1986 (Pet. App. 3-4, 14).

c. The Internal Revenue Service allowed deductions for only the 12 monthly contributions made for services performed during the 1986 tax year. The Service disallowed the deductions claimed for the additional seven or eight contributions made after February 1986 because those additional contributions were not made "on account of" petitioners' 1986 tax year (Pet. App. 4, 15, 29-30).

2. Petitioners sought review of the resulting deficiency in the Tax Court, which upheld the Commissioner's determination (Pet. App. 10-33). The court explained that the history of Section 404(a)(6) shows that its purpose is to "allow[] taxpayers sufficient time after the close of the taxable year to determine the amount of their contributions to be made to the plan" (Pet. App. 25-26). The court noted that, in Rev. Rul. 76-28, 1976-1 C.B. 106, the Internal Revenue Service ruled that a payment made after the close of the taxable year may qualify as "on account of" the prior taxable year if "the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer" (Pet. App. 26-27). The court rejected petitioners' assertion that they satisfied this "same treat-

ment" requirement of Rev. Rul. 76-28. The court explained that, except for the contributions made in February 1986 in respect of services performed in January 1986, it was "obvious" (Pet. App. 29) that the plans did not treat such payments in the same manner that the plans treated payments actually received on the last day of petitioners' 1986 taxable year (*id.* at 27-30).

The Tax Court also found Section 413(b)(7) instructive in determining the year on account of which a contribution is made. The court stated that, since anticipated employer contributions must be computed in a manner consistent with actual employer contributions under Section 413(b)(7), and actual contributions are necessarily based on a 12-month year, "it stands to reason that the anticipated contributions from each employer must be based upon a 12-month year, and the subsequent contributions, and the consequent deductions, in order to be consistent as required by section 413(b)(7) must likewise be based upon a 12-month year" (Pet. App. 28) (emphasis omitted).

The Tax Court rejected petitioners' contention that the Commissioner is precluded from denying deductions for the additional seven or eight contributions because of an asserted administrative practice of allowing such deductions in similar circumstances. Petitioners argued that this administrative practice is reflected in technical advice memoranda (TAMs) involving multiemployer plans and in a series of private letter rulings involving single employer plans (Pet. App. 30-33). The court noted, however, that any reliance on such private rulings is expressly prohibited by Section 6110(j)(3) of the Code, 26 U.S.C. 6110(j)(3), which bars the use or citation of such rulings as precedent (Pet. App. 30-31). The court emphasized that, if the private rulings and

technical advice memoranda were inconsistent with Section 404(a)(6), they would in any event have to "give way to the statute" (Pet. App. 33).

Following the Tax Court decision, petitioners obtained new counsel who filed a motion for reconsideration (Pet. App. 34). In their motion, petitioners asserted that the Tax Court's decision is contrary to a longstanding administrative practice of allowing deductions for such contributions and further claimed that the Commissioner's counsel misled the court by not bringing that alleged practice to the court's attention (*id.* at 35-36). At the same time, petitioners' new counsel filed post-trial requests for judicial notice, based upon sworn declarations with numerous attached exhibits, in an effort to establish that similar deductions had been allowed in three TAMs involving multiemployer plans (*id.* at 36-39).

Noting that petitioners' new counsel had embarked upon a "hodgepodge" of new arguments (Pet. App. 36), the Tax Court denied the request for judicial notice and the motion for reconsideration (*id.* at 34-42, 43). The court explained that the few private rulings cited by petitioners involving multiemployer plans did not show a practice of allowing the asserted deductions in all such cases, for each ruling contained a caveat that the deduction could not exceed the limitations of Section 404(a) (Pet. App. 37). The court emphasized that such private rulings are, in any event, not precedential (*id.* at 39). The court reaffirmed and reincorporated by reference its prior holding that, because contributions after February 1986 were not "on account of" services performed during the taxable year, they could not be deducted in that year (*id.* at 35).

3. Because the "plain meaning of § 404(a)(6) supports the Tax Court's decision" (Pet. App. 4), the court

of appeals affirmed. The court explained that the additional seven or eight contributions that petitioners sought to deduct in their 1986 taxable year "were required to be paid because of work done during the taxable year ending in 1987, not the previous year" (*ibid.*). The "bare language" of Section 404(a)(6) thus "precludes the deduction of those payments on the 1986 return" (Pet. App. 4).[2]

The court of appeals rejected petitioners' assertion that, because the contributions were pooled and did not affect the defined benefit of any individual employee, the payments satisfied the "same treatment" requirement of Rev. Rul. 76-28 (Pet. App. 5-7). The court explained that this contention simply ignores the stipulated facts of this case: (i) petitioners were contractually required to make each contribution near the end of each month; (ii) the amount of each contribution was based on hours or weeks of service rendered during the immediately preceding month; (iii) plan administrators monitored the dates of receipt of monthly contributions, and were empowered to assess interest charges and late fees on delinquent accounts; (iv) plan administrators were not prepared to process contributions in

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[2] The court of appeals stated that the Tax Court decision is also consistent with the purpose of Section 404(a)(6), which is to allow employers sufficient time after the close of their taxable year to calculate the maximum contribution deductible under Section 404(a) (Pet. App. 7).

The court noted that, if employers were able to attribute contributions to a tax year based on work performed after that year, plan administrators could not arrive at meaningful figures in determining anticipated contributions under Section 413(b)(7). The court concluded, however, that it did not need to reach the question whether the contributions were precluded for that reason in this case (Pet. App. 7-8).

excess of the required monthly amounts, and petitioners made no advance contributions; and (v) plan administrators treated each remittance as fulfillment of petitioners' required contribution for a discrete month (*id.* at 6). The court stated that these facts establish that the plans did *not* treat the additional contributions in the same manner they treated contributions made on the last day of petitioners' 1986 taxable year (*id.* at 6-7).

The court of appeals also rejected any reliance on the private rulings that petitioners claim reveal an administrative practice of allowing the deductions. The court stated that "[t]axpayers other than those to whom such rulings or memoranda were issued are not entitled to rely on them. * * * Nor could the IRS establish a binding practice in conflict with § 404(a)(6)" (Pet. App. 7-8 n.5). The court of appeals sustained the Tax Court's rejection of petitioners' requests for judicial notice of the private rulings both because such rulings are not material to the disposition of this case and also because the requests included evidentiary material for which judicial notice would be inappropriate (*id.* at 8). The petition for rehearing and suggestion for rehearing en banc filed by petitioners was denied by the court of appeals (*id.* at 50-51).

4. In a separate case involving virtually identical facts that was brought by the parent corporation of petitioner Lucky Stores, the Tax Court again denied the claimed deductions for post-year contributions. That decision was affirmed by the Tenth Circuit in a decision entered after the petition for a writ of certiorari was filed in the present case. *American Stores Co.* v. *Commissioner*, 108 T.C. 178 (1997), aff'd, No. 97-9025, 1999 WL 122996 (Mar. 9, 1999).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 404(a)(6) of the Internal Revenue Code permits a deduction for a payment to a qualified plan that is made after the close of the taxable year, but before the due date of the taxpayer's tax return, only if the payment is "on account of" the preceding taxable year. 26 U.S.C. 404(a)(6). The additional seven or eight payments made by petitioners after the close of their February 2, 1986, taxable year were made in respect of services performed under the collective bargaining agreements after the close of the taxable year. Such payments for post-tax-year services were thus not "on account of" the prior tax year. As the court of appeals held, "[t]he bare language of the statute precludes the deduction of those payments on the 1986 return." Pet. App. 4.

Petitioners concede that "[c]ontributions to multi-employer plans * * * are attached to a period of time" and that, "[v]iewed from the standpoint of contributions, 'on account of' can have a * * * plain language, meaning" (Pet. 11). Petitioners contend, however, that Section 404(a)(6) should be interpreted from what they refer to as a "benefits" perspective (Pet. 10-11). Petitioners state that, since contributions to defined benefit plans are all placed in a single pool, and all benefits to all beneficiaries are paid from such pool, such contributions, from a "benefits" perspective, are not "attached to, or 'on account of', anything" (Pet. 11), and are "not made 'on account of' any year" (Pet. 10). Petitioners assert that, since contributions to defined benefit plans

are not on account of any year, "the * * * statute, without interpretation, is * * * unworkable" for defined benefit plans (Pet. 10).

That contention, however, ignores the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). As the courts of appeals have consistently held, a contribution is not "on account of" one year if it is made only because of, and in compensation for, work performed in a different year. That straightforward application of the statutory text is consistent with both the language and the purpose of the statute. Pet App. 7-8; *American Stores Co.* v. *Commissioner*, No. 97-9025, 1999 WL 122996 (10th Cir. Mar. 9, 1999). Accord *Airborne Freight Corp.* v. *United States*, 153 F.3d 967 (9th Cir. 1998), petition for cert. pending, No. 98-1287.[3] Because there is no conflict

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[3] The decision of the court of appeals is also required by Section 413(b)(7) (Pet. App. 7-8, 27-28). As the court of appeals noted, if (as petitioners contend) contributions attributable to 20 months or more of services could be attributed to any year the employer chose, it would be impossible for plan administrators to make a meaningful determination of "anticipated" contributions, thereby making Section 413(b)(7) unadministrable (Pet. App. 7-8; see also 16-20, 28-29). As the Tenth Circuit explained in *American Stores Co.* v. *Commissioner*, 1999 WL 122996, at *9:

> Because § 413(b)(7) requires plans to calculate planwide compliance with maximum deduction limits in advance, employers' contributions are effectively restricted by those limits only if a plan and its contributing employers use a common method for attributing payments to specific plan years and taxable years, respectively. The language of § 413(b)(7) implies such linkage. According to § 413(b)(7), once the plan determines that anticipated contributions "for [the] plan year"

among the courts of appeals on the question presented in this case, further review is not warranted.

2. The decisions of the Ninth Circuit in this case and of the Tenth Circuit in *American Stores* also draw support from Rev. Rul. 76-28. That Ruling specifies that a contribution may be deductible in the preceding year only if it is "treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer" (Pet. App. 5, quoting Rev. Rul. 76-28, 1976-1 C.B. 106, 107). Petitioners' additional seven or eight contributions did not satisfy that requirement. Each additional payment was made in response to a bill received from the plan administrator to collect contributions required under the collective bargaining agreements as a result of the performance of services during the preceding month (*id.* at 6, 12-13). The amount of each payment was the mathematical product of the applicable rate and the number of hours or units of services performed during the preceding month (*id.* at 6, 13, 21). Plan administrators treated each payment as the fulfillment of petitioners' required contribution for a discrete month (*id.* at 6, 29-30). Plan administra-

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(calculated by the same method as actual employer contributions "for such plan year") are within the planwide limit, "the amounts contributed . . . by each employer . . . for the portion of his taxable year which is included within such a plan year" also satisfy deduction limits. The statutory scheme of § 413(b)(7) and § 404(a) is thus based on the assumption that an employer may deduct as contributions "for" a particular taxable year only those payments anticipated by the plan "for" the corresponding plan year(s). Although plans do not track the timing of employer deductions, a monthly bill means employers are well aware of plan methods for calculating actual contributions, and, therefore, anticipated contributions.

tors monitored the dates of receipt of monthly contributions and could assess interest charges and late fees on delinquent accounts (*id.* at 6, 16). The plans had no procedures to account for payments in respect of services not yet performed, and only the 12 monthly payments attributable to hours worked during the plan year were considered for actuarial purposes (Pet. App. 6, 16-17). On these stipulated facts, the courts below correctly concluded that the additional seven or eight payments were not treated by the plans in the same manner as payments actually received on the last day of petitioners' 1986 taxable year (*id.* at 6-7, 29-30). The "same treatment" requirement of Rev. Rul. 76-28 was thus not satisfied in this case (*ibid.*). See also *American Stores Co.* v. *Commissioner*, 1999 WL 122996, at *11-*13.

3. Petitioners incorrectly contend (Pet. 3) that this case raises the question whether they may rely on revenue rulings. In this case and in *American Stores*, the courts of appeals rejected the argument that the mere pooling of contributions under a defined-benefits plan satisfies the "same treatment" requirement of Rev. Rul. 76-28. Neither of these courts concluded that petitioners may not rely on a revenue ruling—instead, they both held only that petitioners may not rely upon their *erroneous* interpretation of Rev. Rul. 76-28.

Petitioners' claim that the pooling of contributions satisfies the "same treatment" requirement of Rev. Rul. 76-28 is not based on the text of that ruling. Instead, it is based on TAMs (Pet. 7) and on petitioners' assertion that there is an administrative practice of interpreting Rev. Rul. 76-28 to allow such deductions (Pet. 5-6). That contention is, of course, based largely upon evidentiary submissions advanced for the first

time by petitioners after the Tax Court entered its decision in this case.[4]

As the court of appeals correctly held in this case (Pet. App. 7 n.5), it is well established that such internal administrative documents as TAMs and private letter rulings are not binding as precedent either on taxpayers or on the Service (except in cases involving the taxpayer to whom the ruling was issued). See, *e.g.*, Treas. Reg. § 601.601(d)(1) ("[n]o unpublished ruling or decision will be relied on, used, or cited by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases"); Rev. Proc. 89-14, § 7.01(4), 1989-1 C.B. 814, 815. Section 6110(j)(3) of the Internal Revenue Code expressly provides that "written determinations" such as TAMs "may not be used or cited as precedent" (26 U.S.C. 6110(j)(3)). In enacting that provision, Congress explained that, "[i]f all publicly disclosed written determinations were to have precedential value, the IRS would be required to subject them to considerably greater review than is provided under present procedures." H.R. Rep. No. 658, 94th Cong., 1st Sess. 322 (1975). Even before this statute was enacted, courts repeatedly held that TAMs and private letter rulings are not binding on the Commissioner with respect to taxpayers other than those to whom they were issued. See, *e.g.*, *Norman Corp.* v. *District Director of Internal Revenue*, 446 F.2d 1374,

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[4] Petitioners do not now contend that the denial of their post-trial request for "judicial notice" was in error. As the Tenth Circuit concluded in rejecting an identical, untimely request for judicial notice made by petitioners' parent company in the *American Stores Co.* case, petitioners may not, after submitting a case on fully stipulated facts, thereafter seek to establish additional facts through the assertions of counsel in briefs that are unsupported by the evidentiary record. 1999 WL 122996, at *1-*3.

1375 (9th Cir. 1971); *Shakespeare Co.* v. *United States*, 389 F.2d 772, 777 (Ct.Cl. 1968); *Bookwalter* v. *Brecklin*, 357 F.2d 78 (8th Cir. 1966); *Minchin* v. *Commissioner*, 335 F.2d 30, 32-33 (2d Cir. 1964); *Goodstein* v. *Commissioner*, 267 F.2d 127, 132 (1st Cir. 1959); *Teichgraeber* v. *Commissioner*, 64 T.C. 453, 456 (1975). See also *Beneficial Foundation, Inc.* v. *United States*, 8 Cl.Ct. 639, 644 (1985).[5]

Moreover, this Court has long made clear that the Commissioner cannot be estopped from revising an administrative interpretation or practice when he deems such a revision necessary for the correct enforcement of the tax laws. In *Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984), the Court held that "the Com-

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[5] Petitioners err in relying (Pet. 15) on *International Business Machines Corp.* v. *United States*, 343 F.2d 914 (Ct.Cl. 1965), cert. denied, 382 U.S. 1028 (1966). That case involved whether the Internal Revenue Service abused its discretion in issuing disparate private letter rulings to two similarly situated taxpayers. As the courts have consistently held, that decision has no application when, as here, the taxpayer who seeks the benefit of a private letter ruling issued to another taxpayer did not itself seek a private ruling. *Bornstein* v. *United States*, 345 F.2d 558, 564 n.2 (Ct.Cl. 1965); *Van Norman Indus., Inc.* v. *United States*, 361 F.2d 992, 999 (Ct.Cl. 1966), cert. denied, 386 U.S. 981 (1967); *Carpenter* v. *United States*, 7 Cl.Ct. 732, 741 (1985), aff'd, 790 F.2d 91 (Fed. Cir. 1986); *Western Co. of North America* v. *United States*, 699 F.2d 264, 276 (5th Cir. 1983), cert. denied, 464 U.S. 892 (1983); *Stichting Pensioenfonds Voor De Gezondheid* v. *United States*, 129 F.3d 195, 201 (D.C. Cir. 1997), cert. denied, 119 S.Ct. 43 (1998).

Estate of Shapiro v. *Commissioner*, 111 F.3d 1010, 1018 (2d Cir. 1997), cert. denied, 118 S.Ct. 686 (1998) (Pet. 16), is also inapposite. That case concerned whether the Commissioner is bound by a published revenue procedure upon which the Commissioner had invited reliance. The Commissioner has never invited reliance on TAMs or on the erroneous interpretation of the "same treatment" requirement of Rev. Rul. 76-28 urged by petitioners in this case.

missioner may change an earlier interpretation of the law" and "is under no duty to assert a particular position as soon as the statute authorizes such an interpretation." In *Dixon* v. *United States*, 381 U.S. 68, 73, 74-75 (1965), the Court similarly held that the Commissioner's acquiescence in an erroneous "published * * * ruling" could not, "in and of itself bar the United States from collecting a tax otherwise lawfully due."[6] Petitioners' purported reliance on TAMS and other internal agency documents is thus plainly unavailing in this case.

4. There is no merit to petitioners' assertion (Pet. 14-15) that the decision in this case conflicts with *Estate of McLendon* v. *Commissioner*, 135 F.3d 1017 (5th Cir. 1998). In *Estate of McLendon*, the court concluded that, when a formal revenue ruling established an objective standard for valuing property, the Commissioner could not ignore the ruling merely because evidence peculiar to the taxpayer showed that the property actually had a different value. 135 F.3d at 1021-1025. The reasoning of *Estate of McClendon* obviously does not apply to this case because, as both courts below concluded, the Service correctly interpreted and applied Rev. Rul. 76-28 in this case. Unlike *Estate of McClendon*, this is not a case in which the Commissioner disregarded a revenue ruling—it is a case in

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[6] Petitioners incorrectly assert (Pet. 16) that *Dixon* has no application here because that case was decided at a time when revenue rulings were issued under a disclaimer stating that revenue rulings could not be relied upon by the public, and that Treas. Reg. § 601.601(d)(2)(v)(d) now provides that published revenue rulings may be cited and relied upon by taxpayers as precedent. Unpublished rulings and decisions such as TAMs and private letter rulings continue to be issued under precisely such disclaimers. Rev. Proc. 90-2, 1990-1 C.B. 386, 398.

which the Commissioner correctly applied a revenue ruling.[7] Pet. App. 6-7. See also *American Stores Co.* v. *Commissioner*, 1999 WL 122996, at *12 (distinguishing *McLendon* for this reason).

4. For the reasons already addressed, the contention that petitioners were deprived of due process of law is frivolous. The courts below correctly concluded that the statute and Revenue Ruling flatly contradict petitioners' position on the merits of this case. The assertion of petitioners that they were denied an opportunity to fully and fairly litigate their erroneous contentions on the merits is wholly lacking in substance.

Reduced to its essence, petitioners merely assert that three of the TAMs that they cite support a contention that deductions have been allowed by the

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[7] None of the other cases cited by petitioners conflicts with the decision in this case. In *Silco, Inc.* v. *United States*, 779 F.2d 282, 287 (5th Cir. 1986), the court of appeals sustained a taxpayer's claim of reliance on revenue rulings that indicated "the conceptual approach the IRS would use to determine the tax consequences" of his transaction. 779 F.2d at 287. In the present case, by contrast, in articulating the "same treatment" requirement, Rev. Rul. 76-28 did not indicate that the requirement would be satisfied merely by pooling contributions.

The other decisions cited by petitioners are similarly distinguishable. In *Travelers Ins. Co.* v. *United States*, 35 Fed.Cl. 138, 142 (1996), the court concluded that the government failed to show that a taxpayer's method of accounting did not accurately reflect its income when the method that the taxpayer used was "expressly permitted" by a revenue ruling. In *Beneficial Foundation, Inc.* v. *United States*, 8 Cl.Ct. at 645, the court concluded that the taxpayer's right to a claimed deduction was "clearly establish[ed]" in a revenue ruling upon which it relied. In *Dillon, Read & Co.* v. *United States*, 875 F.2d 293, 299 (Fed. Cir. 1989), the court merely relied on a revenue procedure because of "the reasonable legal position reflected" therein and not because of "any binding effect that it might have."

Service in similar circumstances.[8] As the Tenth Circuit stated in *American Stores Co.* v. *Commissioner*, 1999 WL 122996, at *15, this is "not exactly a decades-long history of consistent administrative practice." Moreover, nothing prevented petitioners from timely raising and briefing the "administrative practice" contention which they now (erroneously) contend was so important to their case.

There is also no merit to petitioners' strained contention (Pet. 17-19) that the extensive factual presentation that they made concerning their untimely motion for judicial notice required them to eliminate from their brief a discussion of "the complex but relevant legislative history" (Pet. 18). The legislative history cited by petitioners (Pet. C.A. Br. 19, citing H.R. Rep. No. 807, 93d Cong., 2d Sess. 47-54 (1974); H.R. Rep. No. 869, 96th Cong., 2d Sess., Pt. 1, at 51 (1980)), contains no discussion of Section 404(a), Section 404(a)(6), or Section 413(b)(7), and does not in any manner suggest that Congress intended to allow the deductions that petitioners seek. Moreover, both the Tax Court and the court of appeals fully considered the relevant legislative history in concluding (Pet. App. 7, 25-26) that the deductions claimed by petitioners were inconsistent with both the text and the purpose of the statute.

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[8] In denying petitioners' requests for judicial notice, the Tax Court noted that the private rulings upon which petitioners relied "includ[ed] in some cases multiemployer plans" (Pet. App. 37). The government similarly advised the court of appeals of the fact that any statement in its briefs that none of the unpublished rulings involved multiemployer plans appeared to be incorrect (Pet. App. 127-130). The facts that petitioners now deem so critical were thus brought to the attention of both of the courts below, even though petitioners failed timely to place that matter at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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